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# KENTUCKY LEGISLATURE.

IN SENATE.

WEDNESDAY, Feb. 11, 1846.

Prayer by Rev. Mr. ALLEN, of the Presbyterian Church.

The Clerk read the Journal of yesterday.

Petitions were presented by M. BRAMLETTE. Mr. GRAY, the rules being dispensed, moved the following resolution:—

Resolved, That the select committee appointed to investigate the case of Geo. W. Kouns, shall not be required to re-take any testimony that either appears in the depositions, or was taken before the committee of the House of Representatives; but their examination of testimony shall be confined to witnesses who were not examined heretofore, and such examination shall also be confined to the charges sustained by the House of Representatives and reported in the resolutions of that House.

Mr. PEYTON moved that the vote of yesterday, adopting the instructions (moved by him) to the select committee, be re-considered.

(A message from the H. R. announcing its action on sundry bills.)

And the question being taken on the re-consideration, it was decided in the affirmative, yeas 20, nays 15, as follows:

YEAS—Messrs. W. P. Boyd, Bradford, Bramlette, Butler, Chennell, Crenshaw, Duffin, Dyer, Evans, Grav, Hardin, Henderson, Holloway, Key, Patterson, Peyton, Taylor, Todd, Walker and Woodson—20.

NAYS—Messrs. Ballard, A. Boyd, Bradley, Conner, Drake, Harris, Healy, James, Marshall, Newell, Slaughter, Swope, Thomas, Thurman and Wallace—15.

Mr. PEYTON moved a substitute for Mr. GRAY'S resolution, which the latter accepted, as follows:

Resolved, That the select committee appointed to investigate the case of Geo. W. Kouns, shall not be required to re-take any testimony that either appears in the depositions, or was taken before the committee of the House of Representatives; but their examination of testimony shall be confined to charges sustained by the House of Representatives, and for this purpose they shall examine or re-examine any witnesses they may think proper.

But the question being decided by the SPEAKER, (in consequence of the vote of re-consideration) to be on the resolution offered yesterday by Mr. CONNER.

Mr. PEYTON moved his resolution as an amendment thereto, in the nature of additional instructions to the committee; and the question being taken thereon, it was decided in the affirmative.

A message from the Governor by Mr. Secretary HARDIN.

Mr. CONNER presented an affidavit of Geo. W. Kouns, which was referred to the select committee on his case.

REPORTS FROM STANDING COMMITTEES.

Mr. HELM, from the committee on the Sinking Fund, a H. R. act for the benefit of Henry Blanton and Robert Small, executors of Carter Blanton, deceased, without any expression of opinion by the committee: ordered to be read a third time.

Mr. KEY, from the committee on Banks, a resolution rejecting the petition of sundry citizens, praying the location of a Branch of one of the Banks of Kentucky at Greensburg: adopted.

Also, a H. R. act to amend an act establishing the Louisville Bank of Kentucky, and an act incorporating the Merchant's Louisville Insurance Company: passed.

Mr. WALKER moved to suspend the orders of the day, to enable the committee to report: agreed to.

Mr. PEYTON, from the committee on Banks, a bill to transfer the duties of the President of the Commonwealth's Bank, and Agent of the Old Bank of Kentucky, to the First Auditor, and requiring certain duties of the First Auditor and Attorney General: ordered to be printed and made the special order for next Saturday.

Mr. HARDIN, from the committee on the Judiciary, a H. R. act to amend acts incorporating the town of Columbia, with an amendment: concurred in.

Mr. WOODSON moved an amendment, authorizing the citizens of Versailles to vote for a Chairman and Trustees, and requiring orders for grading streets to be recorded in the Woodford County Court: adopted.

The bill is amended, then passed.

Also, a H. R. act for the benefit of John Rogers and children, with an amendment: concurred in and passed.

Mr. HARDIN, from the same committee, a H. R. act for the benefit of Hubbard B. Smith, deceased, with an amendment: concurred in and passed.

Also, a H. R. act to incorporate the Lawrence County Coal Company, with an amendment: laid on the table for the present.

Also, a H. R. act for the benefit of Jacob White, Sheriff of Fulton, with an amendment: concurred in and passed.

Also, a bill to establish a chancery term of the Clarke Circuit Court: to be held the first Tuesday after the fourth Monday in June, and sit five judicial days: passed.

Also, a bill concerning the Barren Circuit Court: a chancery term to be held the fourth Monday in June, and sit six judicial days: passed.

Also, a bill to change the time of holding the Caldwell Circuit Court: to be held the first Monday in June and December, and sit eighteen judicial days: passed.

Also, a bill to reduce the number of Justices of the Peace in Spencer to nine: passed.

Also, a bill to change the venue in the prosecution against Addison, a slave of Greenberry Gaither, from the Meade to the Hardin Circuit Court: passed.

Also, a bill for the benefit of James C. Price and Mary C. Price, his wife: authorizes sale of land: passed.

Also, a bill for the benefit of Sabina Turpin and others: confirms a sale of slaves: passed.

Also, a bill to incorporate the Cook Benevolent Institution, of Louisville: passed.

Also, a bill to change the venue in the prosecution of Enoch Stephens for bigamy, from the Jefferson to the Bullitt Circuit Court: passed.

Also, a bill for the benefit of Joseph S. N. and James M. Dickson: passed.

Also, a bill for the benefit of William Smart: passed.

Also, a bill concerning private passways in this Commonwealth, with the opinion of the committee, that it ought not to pass.

Mr. PEYTON moved that the bill lie on the table till the first of June: agreed to.

Mr. HARDIN, from the same committee, asked to be discharged from the petition of — Myres, and that leave be granted to withdraw it: agreed to.

Also, a resolution rejecting the petition of Tho. Todd: adopted.

Also, a resolution rejecting the petition of citizens of the town of Athens, in Fayette, praying that the chairman of the trustees have a magistrate's jurisdiction: adopted.

Also, a resolution rejecting the petition of W. U. Thomas, of Allen: adopted.

Also, a bill regulating the terms of the Louisville Chancery and Jefferson Circuit Courts, and for other purposes: the Circuit Court to hold four terms each year, beginning the first Monday in May,

June, October and December, and sit six weeks, four of which to try civil suits, and two, pleas of the Commonwealth; and after the year 1846, to sit the first Monday in February, April, June and October: passed.

Also, a H. R. act reducing into one the several acts concerning the town of Danville: passed.

Also, a H. R. act for the benefit of Preston F. Samuels: rejected.

Mr. GRAY, from the committee on the Lunatic Asylum, a bill for the benefit of the Lunatic Asylum: read first and second time, and ordered to be printed.

Mr. GRAY presented a memorial from Miss D. L. Dix, soliciting an appropriation for the State Hospital for the insane at Lexington, and also urging the necessity for establishing a new hospital in the Green river country, and moved the printing of 1,000 copies thereof: agreed to.

Mr. HARDIN moved that the committee on the Judiciary be discharged from the consideration of the Owsley county seat question, and that the same be referred to the committee on Propositions and Grievances: agreed to.

Mr. TODD moved that the rules be dispensed to enable him to ask leave to bring in a bill: negatived.

And then the Senate adjourned.

## HOUSE OF REPRESENTATIVES.

WEDNESDAY, Feb. 11, 1846.

The Journal of yesterday being read.

Mr. A. JOHNSTON moved that the rules be dispensed for the purpose of taking up a bill from the Senate: but the House refused.

Mr. E. SMITH proposed the following joint resolution, which lies one day on the table, to-wit:

Resolved, &c., That the present General Assembly will, by joint ballot proceed, at 12 o'clock, on the 21st inst., to the election of the public officers of this Commonwealth.

Petitions, &c., were now presented by Messrs. MILLER, ABRETT and FORD: which were received and referred.

Mr. BOTTS, from the committee on the Judiciary, reported a bill for the benefit of John D. Howard: providing for a change of venue for the prosecution against him in the Jefferson Circuit Court, to the Bullitt Circuit: which was read; and the constitutional provision as to the second and third readings being dispensed with, the bill passed.

REPORTS FROM THE COMMITTEE ON THE JUDICIARY.

Mr. HARLAN reported the facts in connection with the claim of John Tilford, and asked that the same be printed: which the House refused.

Mr. H. then proceeded to report, without amendment, the bill entitled, an act to amend an act, authorizing a settlement with John Tilford, approved 10 February, 1845: construing the second section of said act so as to authorize a majority of the commissioners appointed for that purpose, to consummate the settlement. But, on motion of Mr. HAGGARD, the vote refusing to print the facts reported, was reversed, and the printing being ordered, the bill reported was withdrawn.

Mr. HARLAN proceeded to make the following reports, which received the action of the House, to-wit:

A bill to change the name of Mary M. Graham, to Mary M. McIntyre: which was withdrawn on the suggestion of Mr. PETERS, who said the bill had been superseded by way of amendment to a former bill passed.

A bill to change the venue in the case of the prosecution against Joseph H. Coleman: from the Adair Circuit Court, to the Green Circuit: which was read, &c.: and on motion of Mr. WHEAT, at the proper stage for amendment, the word "Green" was struck from the bill, and the word "Barren" inserted: and then the bill passed.

A bill authorizing the County Court of Marshall county to appoint a treasurer: passed.

A bill to amend an act, entitled, an act, for the benefit of Eliza A. Romans, approved February 13, 1841: [William Clark appointed her trustee, in the place of William Romans, who has departed this life:] passed.

A bill to establish a Mechanic's Institute at Paducah: [Trustees—James Long, Samuel Purcell, Whitfield Lett and others:] passed.

A bill for the benefit of the infant heirs of James Howe, deceased: passed.

Mr. DUDLEY, from the committee on the Judiciary, reported as follows, to-wit:

A bill, entitled, an act to allow an additional week to the term of the Ballard Circuit Court: passed.

A bill to change the time of holding the August term of the Hickman County Court to the Thursday succeeding the first Monday: passed.

A bill to repeal in part, and in part amend the act, entitled, an act, to amend the law incorporating the town of Hickman, in Fulton county, approved February 15, 1841: [repealing the 4th section, &c.]: passed.

Mr. BOTTS, from the same committee, reported a bill to reduce the number of Justices of the Peace in Washington county,—providing for a reduction of their number to thirteen: passed.

Mr. HARLAN, from the same committee, then proceeded with his reports, to-wit:

A bill for the benefit of Wm. F. B. Garritt and Rebecca Garritt, infants, &c.—Shelby Circuit Court may decree a sale of their lands: passed.

A bill requiring the Clerks of County Courts to perform certain duties: requiring them to make cross or double indexes to all books in which deeds and mortgages shall hereafter be recorded in their respective offices: passed.

A bill to extend the terms of the Cumberland Circuit Court: without amendment: to twelve judicial days: which was read.

Mr. HAGGARD proposed to amend by a section to change the time of holding the terms of the Monroe Circuit Court to the 4th Monday in April and October—so continue twelve judicial days: and after some opposition by Mr. BARLOW, Mr. BRAUNER proposed to amend the amendment by a section to change the time of the terms of the Whitley Circuit to the 3d Monday in March and September: which was adopted: and then the amendment was amended and rejected, and the bill was also rejected.

A bill to amend and reduce into one the several acts in relation to the town of New Liberty in Owen county. The bill is a copy of that sent up with the petition, except that it extends the time for the redemption of the lands forfeited for taxes, which may belong to infants and *femes covert*, to two years, instead of one year: passed.

A bill for the benefit of Robert A. and Mary P. Moffitt: the Trimble Circuit Court may decree a sale of land belonging to the said infants: passed.

Mr. HARLAN, from the committee on the Judiciary, to whom had been referred the resolution of this House directing an inquiry into the propriety of changing one of the sessions of the Court of Appeals to the month of December or January: reported a bill, to-wit:

A bill concerning the Court of Appeals: [which was read—fixing one session to commence on the first Monday in April, and the other to commence on the first Monday in December.]

Mr. HARLAN proposed two amendments, to-wit: first, strike out "December," and insert "October;" second, adding a section, to the effect, that process or writs of error, returnable before the Court of Appeals, may be directed to the Sergeant of the said Court and be executed by him; provided he shall not

charge higher fees than at present by law allowed to Sheriffs for such service.

Mr. STEVENSON proposed to amend the amendment by striking out the word "October," and inserting the word "January;" and also to amend the bill by striking out "April," and inserting "July."

Upon the adoption of the amendment to the amendment, some debate arose in which Messrs. STEVENSON, WALKER and COX sustained the affirmative, and Messrs. E. SMITH, HARLAN and L. COMBS the negative.

And then, under the force of the previous question, the House determined to strike out from the amendment the word "October."

And on the question to insert the word "January," the vote stood, yeas 50 nays 43.

And the question then being taken on the adoption of the amendment as amended, (which the SPEAKER said was equivalent to striking out "December," in the original bill, and inserting "January,") it was carried.

And the question being taken on the second amendment proposed by the gentleman from Kenton, to-wit: the change from April to July, it was decided in the affirmative.

And the question, being on the adoption of the second amendment proposed by the gentleman from Franklin—after a few words of explanation, in which Mr. HARLAN was indulged by consent, and by request of the gentleman from Livingston, the amendment was adopted.

And then, after the order for engrossment, &c., the constitutional provision as to the third reading was dispensed with; and the question being on the passage of the bill.

Mr. HARDY stood up against the proposition.—It would place, he said, special inducements before one portion of the community to seek for themselves places upon this floor. One session of the Court of Appeals being fixed for January and February, lawyers, by becoming members of the Legislature, would endeavor to kill two birds with one stone; and being elected to discharge legislative duties, there would be a temptation that would frequently prove too strong for their nature to neglect their public duties for their attentions to their clients before the Court of Appeals—thereby protracting the sessions of the General Assembly and squandering the public money, &c. And amongst other cases of neglect of public business while representatives were attending on courts, he mentioned, that such was perhaps the reason why Kentucky was not represented by the vote of Mr. Crittenden in the United States Senate on the resolution to admit into the Union the State of Texas. Therefore, it was his belief that the bill ought not to pass.

Mr. STEVENSON had a high sense of respect for the gentleman from Barren. He was so impressed to an uncommon degree, considering the brief term of his acquaintance with that gentleman. But he was astonished at the position which he had now taken; because the principle upon which he stood was hostile to our institutions, and by following it out he would strike a blow at the foundation of one of the main pillars which constituted the support of both his and Mr. S.'s political faith. What was the argument which the gentleman had adduced? It was that the people were not competent to discriminate between candidates to represent them? &c.

Mr. KELLY and Mr. MAYES opposed the bill. Mr. WALKER followed in favor of the bill.

Mr. L. COMBS. In reply to the intimation by the gentleman from Barren, (Mr. Hardy) respecting Mr. Crittenden's absence from the Senate of the U. States, when the question was taken on the resolution to admit into the Union the State of Texas, Mr. C. said he would take leave to read to the House a private letter which he had this morning received from that gentleman. (Mr. Crittenden) in which he had incidentally explained the reasons why he declined voting on that question. He read only a portion of the letter, which was to the effect, that Mr. C. having opposed, on constitutional grounds, the resolutions of the last session of Congress for the annexation of Texas—although he now considered the question as a settled matter, he forbore, on the same constitutional grounds to vote for the consummation of a measure which he had regarded as unconstitutional in its inception. His doubts prevented his voting for the resolution; while, on the other hand, he did not feel himself required to vote against it, as a matter of duty; because the question, to a great extent, had become a settled matter; and because also it was his individual wish to see the admission consummated by the adoption of the resolution. He could not vote for it, without disregarding serious constitutional doubts; nor against it, without violating his wishes—wishes connected with an earnest conviction, that it was for the best interests of the country that this subject should be put to rest with as little delay, opposition and strife as possible. The letter further represented, that he, (Mr. Crittenden) had uniformly, by speech and vote, assumed all the responsibility of a frank and open and sincere course on the whole of this great subject. He had nothing to avoid or to gain in that respect; and would disdain any imputation of a design to evade responsibility by declining to vote on that resolution, &c.

Mr. BROWN followed in opposition: and, when he had concluded, the previous question was called and sustained by the House. The main question being, Shall the bill pass? it was decided in the negative, by yeas 34; nays 59.

So the bill was rejected.

Mr. HARLAN, from the committee on the Judiciary, to whom had been referred a bill for the benefit of landlord and tenant, reported, by way of substitute, a bill to amend the execution laws: which was read.

Mr. H. explained the object of this bill as follows: As the law now stands, if a landlord rent his ground to his tenant, and agree to take for his rent a portion of the crop, an execution against the said tenant may sweep the whole crop—including the landlord's portion. This bill provides, that where an execution comes against such a tenant, the landlord's portion of the crop shall not be leviable. &c.]

The bill passed with an amendment of title, to-wit: a bill for the benefit of landlord and tenant.

The hour for recess having arrived,

Mr. KELLEY, by special dispensation, had leave to introduce a bill to amend the laws in civil and chancery proceedings: which was referred to a select committee.

And then the SPEAKER announced the daily recess.

## EVENING SESSION.

The SPEAKER resumed the Chair.

Mr. PETERS, rising to a privileged motion with reference to the vote of Monday, by which thirty-four members were counted in favor of re-considering the vote of Saturday, by which the Governor was addressed in relation to the removal from office of George W. Kouns, a Justice of the Peace for Carter county. Mr. P. understood and argued, that, as the Constitution required a majority of two-thirds to carry such a proposition, it should be competent for one-third to re-consider such a vote; and more than one-third had voted to re-consider on Monday, when it was the decision of the Chair that the House refused to re-consider. This vote of thirty-four in favor of re-considering on Monday, was, to his mind, evidence *prima facie* that more than a constitutional minority on the question were dissatisfied with the vote recorded on Saturday; and, although no one on that floor submitted with more cheerfulness to the decisions of the Chair than Mr. P., yet now, as the most direct way of taking the

sense of the House on the question, and settling it at once, with the most perfect good feeling in the premises, he would respectfully take an appeal to the House from that decision of the Chair.

The question of the appeal was then discussed further by the CHAIR—Mr. COX and Mr. J. S. SMITH sustaining the Chair; and Mr. DESHA and Mr. HUNTON sustaining the appeal.

When, under the force of the previous question, the decision of the Chair was sustained and affirmed by yeas 87, nays 2.

Mr. HUGHES, from the Joint committee, appointed to examine into the condition of the Lunatic Asylum at Lexington, and the Deaf and Dumb Asylum at Danville, now laid before the House a written report in behalf of said committee: which was received, and 200 copies ordered to be printed.

Miss D. L. Dix, setting forth the propriety of an appropriation of money for the improvement of the Hospital at Lexington, and the establishment of a Hospital in the Green river country: of which 500 copies were ordered to be printed.

On motion of Mr. S. STONE, and after discussion by Messrs. HUGHES, HARDY, BARLOW, and HAGGARD, the vote of this day, by which the bill to extend the terms of the Cumberland Circuit Court was rejected, was re-considered; and on further motion of Mr. BARLOW, it was referred again to the committee on the Judiciary.

Mr. KELLY, by special dispensation, and under instruction from a select committee, reported a bill to amend the law in relation to civil and chancery proceedings: which was read, &c.: the bill provides that any individual, amongst heirs, devisees, or distributees, parties with him to a suit, on coming forward and making oath that justice he thinks will not be awarded to him, or that the suit is being presented to the prejudice of his interest—that the court shall allow such individual to appear and plead by himself and counsel, &c.; and providing further that in cases where there are a plurality of persons, plaintiff or defendant, it shall not be necessary that process shall be served on all, nor on more than one, in order to go into trial; and providing that nothing shall be so construed as to operate on those concerned, but who may not be brought before the court, &c.

Mr. HUGHES. In consideration of the fact that this bill had been reported on the leave of the honorable Speaker, [Mr. Underwood,] to extend to him the opportunity of submitting his views, &c., Mr. H. moved that the subject be referred to the committee of the Whole, and made the special order for this day: which was carried.

And accordingly the House resolved into committee.—(Mr. KELLY in the Chair.)

The bill being reported by the Clerk.

Mr. Speaker UNDERWOOD, illustrated the reason and the necessity of its provisions, by stating several facts in connection with his own practice.

Mr. PETERS proposed to amend by adding a section, to the effect that, where process has been served twenty days before the commencement of the term, the party defendant shall be required to appear and plead at the same term. &c.

Mr. HARLAN proposed an amendment in relation to the manner of taking depositions out of the State—prescribing interrogatories, &c., and embracing also the foregoing amendment.

Which amendments were severally read, argued and withdrawn.

Mr. COX moved to strike out the 3d section of the bill: negatived.

Mr. GLENN moved that the committee rise and report the bill to the House: agreed to, whereupon the SPEAKER resumed the Chair, and Mr. KELLY reported as directed.

The bill then passed.

And then the House adjourned.

From the Yeoman.

SPEECH OF MR. ELISHA SMITH OF ROCKCASTLE, Delivered in the House of Representatives, Thursday, the 5th inst., on the bill to amend the Penal Laws.

[This bill is understood to have originated out of a controversy between the County Court of Franklin and the Court of Appeals, about the office of Jailer in said county.]

Mr. SPEAKER:—The bill under consideration, it is said, originated from a conflict between the Court of Appeals and the County Court of Franklin, touching the relative powers of the two tribunals.

All laws, both civil and criminal, are based upon facts which have transpired rendering their enactment necessary or expedient—hence it becomes necessary and proper the case which generated the proposed act should be understood, with a view to remove the evil or correct the abuse if any exist.

According to the record it appears, that in June last, the County Court of Franklin removed the Jailer then in their employ and appointed another.

The removed Jailer sued out a writ of error from the office of the Court of Appeals, and made the appointed Jailer a defendant to his writ. The latter moved to dismiss the writ of error, because the Court of Appeals had not, agreeably to the constitution and laws of Kentucky, appellate jurisdiction to revise the order of the County Court. The motion was overruled, and a mandate sent to the County Court, at their November session, directing that their appointment should be set aside. In discharge of the duty which the County Court owed to the country and themselves, they rejected the command of the Court of Appeals, because, as they believed, the Court of Appeals had no authority to interfere in the matter. This is the history of the case, as published in the public journals in Frankfort. If there be error in the procedure, or offence in the action, it certainly rests in one of the two Courts, and not in the ministerial officers of either. The bill, though general in its terms, evidently is intended to operate upon Maj. Lockett. It proposes to punish the Jailer for not doing voluntarily, what was sought by the litigation, after the result shall have been made known to him. Why this total departure from civil proceedings, in both England and America? Is not the suit of the civil class? Who has overheard, before the suggestion contained in this bill, that an unsuccessful suitor ought to be, or might be indicted, fined and imprisoned, if he did not comply with the decisions of the Court of Appeals, even after it had been returned to the Court of original jurisdiction? The right to money or property can only be obtained through the regular process of law by the Courts. The right to office is not more valuable or sacred, than the rights of property, person or reputation. Why then, this innovation upon jurisprudence? The Clerkship of the Montgomery Circuit Court was not, in 1834, settled by legislation or penal enactments, but by the usual mode of litigation. There is nothing in this case extraordinary. This House has just settled a controversy between two gentlemen from Boone county, relative to a seat in this Hall, without inflicting a fine upon either. To hold unlawfully a legislative office is surely a greater crime than to detain the offender described in the bill is unworthy of the punishment denounced; and the mode and means used to inflict it, are at war with the immemorial usages of law, and the genius of the government.

The Legislature is the grand inquisitorial power of the State, and ought to examine into the conflict between the two courts, and correct the abuse if any may have been committed. This government—in all its departments, must be conducted in conformity to the requisitions of the constitution.—The highest as well as the lowest officers are subject to constitutional restraints and regulations.

Then it becomes necessary, before condemning

either court, to scrutinize the whole proceeding upon which the proposed law is based.

The fourth article of the Constitution establishes both the Court of Appeals and the County Courts, and defines most of their powers. To the former are given matters of law and equity, for decision. To the latter by the third article and ninth section of the Constitution, concerning the Executive Department of the Government, is given the appointment of inspectors, collectors and their deputies, surveyors of the highway, constables, jailers, and such other inferior officers, whose jurisdiction may be confined within the limits of a county. The classes of cases are entirely different. Those confided to the Court of Appeals are purely judicial, and those to the County Courts, executive. The one Court deriving its constitutional powers altogether, under the article concerning the judicial department, and the other, the power of appointing a Jailer under the article concerning the Executive Department, thereby showing conclusively that the Court of Appeals undertook to reverse an executive act performed by the County Court. The question arises, had that Court any power either by the Constitution or the laws of the land, to examine into the legality of such an executive act by the County Court. The Constitution itself, explicitly declares that the powers of Government shall be divided into three distinct departments, and each of them confided to a separate body or magistracy, and no person being of one shall exercise any power properly belonging to either of the others, except in the instances therein permitted. Precedents from the Court of Appeals clearly prove that no writ of error or appeal lies to reverse directly an executive act, as may be seen by reference to the case of Stonebrink [now the Clerk of the Senate] vs. Harrison, 5 Little, 161. In that case a Circuit Judge appointed his Clerk, but there was no writ of error to revise the appointment. Suit was brought for the fees of the office, and all that the Court could decide was that the plaintiff had a right to recover.

There was no opinion given by the Court to nullify the appointment. The next case was an appointment by the Governor of an Attorney for the Commonwealth, who moved to be sworn into office as such before the Lincoln Circuit Court, which motion was overruled; and the motion was brought to the Court of Appeals for revision; but the executive act of the appointment was not reversed and a mandate sent to the Governor, directing him to furnish his appointment: see 1 Dana, 417; Bruce vs. Fox. Here is a case from the County Court, upon writ of error, to reverse an order displacing a Clerk and appointing another. Prior to Commonwealth vs. J. J. Marshall, 401. The Court were unanimous in the opinion given, and reasoned as follows: "The appointment of a Clerk is not, strictly speaking, a judicial act. Appointment to office is intrinsically executive. And, although the Constitution has confided to the Courts the appointment of their own Clerks, still the nature of the power is not changed. It is essentially executive, wherever or by whomsoever exercised. It is as much executive when exercised by a Court as by the Governor. It is the prerogative of appointing to office, and is of the same nature, whether it belong to a Court or to a Governor. The appellate jurisdiction of this Court is judicial. We can revise that only which is judicial. Neither a writ of error or an appeal will lie to this Court, to revise or nullify any executive appointment, or other executive act. If the Governor make an illegal appointment, or if any other depository of any portion of the executive functions of Government act erroneously or illegally in the exercise of its appointing power, the appointment cannot be set aside by a direct appeal to this Court; nor can an incumbent, who may have been illegally or unjustly supplanted by the unauthorized appointment of a successor, rectify the error, and procure his re-installment, by writ of error, or appeal to this Court to reverse the order appointing the successor, or superseding himself. But in such a case as the one now before the Court, the law does not give to any one individual any exclusive right to the office. The office is created for the public good. In conferring it, the only known power which is exercised, is executive; and in every determination, whether expressed or implied, incidental to the appointment, there was no display of any attribute of a judgment of a Court on the private rights of opposing individuals. The conclusion seems to be fair and difficult to resist, that this Court has no jurisdiction of this writ of error. There is no power to adjudicate on the order of the County Court in a direct proceeding to revise. The only







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